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No. 96-1768

In The
Supreme Court of the United States
October Term, 1997

C. ELVIN FELTNER, JR.,

Petitioner,

v.

COLUMBIA PICTURES TELEVISION, INC.,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE AMERICAN
INTELLECTUAL PROPERTY LAW ASSOCIATION
IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

The American Intellectual Property Law Association ("AIPLA") is a national association of more than 10,000 members whose interests lie in the area of copyright, patent, trademark, trade secret, and other areas of intellectual property law. The AIPLA's members include attorneys in private practice and attorneys employed by corporations, universities, and government, and represent both owners and users of intellectual property. Unlike many other areas of practice in which separate and distinct plaintiff's and defendant's bars exist, most, if not all, intellectual property attorneys represent both intellectual property owners and alleged infringers.

The AIPLA has no stake in either of the parties to this litigation or the result of this case, other than its interest in seeking correct and consistent interpretation of the law affecting intellectual property.¹ In the hands of judges, statutory damages provide the flexibility necessary to preserve the difficult balance that copyright law strikes between rewarding creators and providing the public access to innovative and creative works. The AIPLA is convinced that judges are best-suited to exercise such discretion and will better understand the balance that copyright law promotes. The disruption of this balance would harm some of the most dynamic and important sectors of our economy. Therefore, for the reasons set forth in this brief, the AIPLA respectfully requests that this Court uphold the prior judgment in favor of Columbia Pictures.

¹ Pursuant to Rule 37.6, none of the parties or their counsel have contributed either substantively or monetarily to the preparation of this brief. Specifically, only the amicus, its members and its counsel have made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Ninth Circuit correctly held that neither section 504(c) of the Copyright Act nor the Seventh Amendment require the right to a jury trial in cases where the plaintiff claims statutory damages. Section 504(c) grants the "court" broad discretion (within a range of monetary amounts) to award statutory damages. This grant of broad discretion establishes statutory damages as an equitable remedy that judges should determine. Congress did not intend to grant a right to a jury trial and the Seventh Amendment does not require one.

A copyrighted work is a unique form of property. An infringer can take and use a copyrighted work without depriving the original owner of its use. This unique circumstance often makes it difficult to prove, by traditional measures, damages and profits. Nevertheless, infringement does deprive the owner of valuable rights granted by the Copyright Act, thereby causing economic harm. Recognizing the limitations of traditional remedies, Congress created statutory damages, granting the court broad discretion, within certain parameters, to remedy the harm caused by infringement.

Statutory damages are thus a classic equitable remedy: they allow the court discretion to step in and provide relief where traditional legal remedies would fail to do so. Such discretion lies at the heart of equity jurisdiction.

In accordance with this Court's recent decision in *Markman*, careful consideration must be given to the relative strengths of judges and juries. Judges, because of their training, experience, and function, are better able to understand the hows and whys of applying the discretion

allowed by statutory damages. The legal system typically confines juries to determining facts, and then applying the law, as it is explained to them, to the facts. Statutory damages awards are not grounded in proof of actual damages, and thus are poorly matched to the functions and abilities of juries. Judges also are better suited to fulfill the purpose underlying statutory damages. Moreover, nothing about the remedy calls for the special competencies of juries.

Since neither the statute nor the Seventh Amendment requires a right to a jury trial, the Ninth Circuit decision should be affirmed.

ARGUMENT

I. THE DISCRETIONARY AWARD OF STATUTORY DAMAGES IS ESSENTIAL TO FURTHERING THE POLICIES UNDERLYING COPYRIGHT

A copyrighted work is a unique form of property; it requires unique forms of protection, including the availability of statutory damages. It essentially is a "public good."² Because it is intangible, one can take it and use it without depriving the original owner, or others, of its use. Moreover, it normally is difficult to prevent such infringing use.

This unique nature is both boon and bane. On the one hand, creative and innovative works, and the benefits they

² Wendy J. Gordon, *Fair Use As Market Failure*, 82 Colum. L. Rev. 1600, 1610-16 (1982) (describing copyright law as an attempt to address the "public goods" problem).

provide, can be widely disseminated to the public -- the supply is virtually inexhaustible. On the other hand, because unauthorized copying or performance is so easy, creators may find it hard to secure compensation, and thus may be discouraged from creating works in the first place, or disseminating them to the public.³

The Framers of the Constitution recognized this conundrum. The Constitution therefore allows Congress to reward creators for their works, but only "for limited Times." *U.S. Const.* art. I, §8, cl. 8; *The Federalist*, No. 43 at 207 (H.C. Lodge ed. 1888). The Copyright Act does so, in part, by requiring infringers to pay damages or profits to the owner.

Because of the unique nature of copyrighted works, however, infringements often occur for which damages or profits are difficult to prove. *Douglas v. Cunningham*, 294 U.S. 207, 209 (1935). For example, a company might, for convenience, wrongly make copies of a journal article that its researchers may later need for commercial research. *See, e.g., American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1994). Another infringer might wrongly perform music in its restaurant to enhance the atmosphere. *See, e.g., Broadcast Music, Inc. v. Papa John's, Inc.*, 201 U.S.P.Q. 302 (N.D. Ind. 1978). Yet another might copy a competitor's marketing materials so that it need not prepare its own. *See, e.g., Deltak, Inc. v. Advanced Sys.*, 767 F.2d 357 (7th Cir.

³ William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 18 J. Legal Studies 325 (1989) (explaining how copyright law promotes efficiency by striking a balance between incentives to creators and public dissemination).

1985). The profit, if any, gained by the infringement in these instances is almost impossible to quantify. The same is true for actual damages, because the infringer has not deprived the copyright owner of either the use of its work or of customers for its work.

Even if a copyright owner is unable to prove traditional measures of damages, an infringement nevertheless deprives the owner and the public of valuable benefits. The copyright laws give copyright owners exclusive rights to reproduce the work, to distribute it, to perform it, to display it, and to prepare derivative works based on it. 17 U.S.C. §106. "Taken together these rights reflect Congress' balanced judgment about the uses that a copyright owner must be able to prohibit in order to appropriate the value of its work through sale or licenses in the marketplace and about those uses that, in the interests of public access, must not be fettered by copyright." Paul Goldstein, *Copyright* § 1.14.2.3 at 1:51 (2d ed. 1996).

If copyright owners were deprived of these exclusive rights merely because they could not prove traditional damages, the purposes of copyright law would be frustrated. The scientific journal author and the composer may choose not to benefit society with their work. A business, like the one in *Deltak*, authoring marketing materials may not bother to take this innovative, competitive action if its competitor can just appropriate its work.

To avoid such outcomes, Congress created the remedy of statutory damages. *Douglas v. Cunningham*, 294 U.S. at 209. "The necessary flexibility to do justice in the variety of situations which copyright cases present can be achieved only by exercise of the wide judicial discretion within limited amounts conferred by this statute." *F.W. Woolworth Co. v.*

Contemporary Arts, Inc., 344 U.S. 228, 232 (1952). Statutory damages thus play an essential role in ensuring the effectiveness of the copyright laws.

II. CONGRESS GRANTED "THE COURT" BROAD DISCRETION TO DETERMINE STATUTORY DAMAGES, THUS CREATING AN EQUITABLE REMEDY

The discretionary nature of the statutory damages remedy is the key to both the Seventh Amendment and statutory interpretation questions presented here.⁴ The nature

⁴ *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970), set forth three factors for analyzing the Seventh Amendment issue: "[F]irst, the pre-merger [of law and equity] custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." This brief addresses in detail the second and third prongs of the *Ross* test. Several courts and commentators have found analysis of the first prong unhelpful to deciding the instant issue. See, e.g., *Educational Testing Services v. Katzman*, 670 F. Supp. 1237, 1242 (D.N.J. 1987) (finding a right to a jury, but noting "the word 'custom' applied here would be somewhat misleading"); *Papa John's, Inc.*, 201 U.S.P.Q. at 304-05 (finding no right to a jury, and finding the pre-merger custom "unclear"); Andrew W. Stumpf, Note, *The Availability of Jury Trials in Copyright Infringement Cases*, 83 Mich. L. Rev. 1950, 1958 (1985) ("historical analysis fails to yield a definitive answer"). As these authorities describe in detail, the history is not clear. Before 1909, statutory damages did not exist. The closest that the copyright law came was liquidated damages--specified amounts, awarded through mechanistic formulas. The lack of discretion inherent in this

of the remedy--equitable or legal--normally determines the right to a jury trial under the Seventh Amendment. *Wooddell v. International Brotherhood of Elec. Workers*, 502 U.S. 93, 97 (1991). Such is the case here, where the broad discretion allowed to do justice, and the remedy's restitutionary nature demonstrate that it is equitable.

A. By Granting Broad Discretion To "The Court," Congress Provided That Judges Should Determine Statutory Damages

The greater the discretion granted by a statute, the less likely it is that Congress intended to give it to the jury. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 443 (1975) (Rehnquist, J. concurring).

In this instance, the court's discretion is extremely broad. "[T]he employment of [statutory damages], within set limits, is committed solely to the court which hears the case, and this fact takes the matter out of the ordinary rule with respect to abuse of discretion." *Douglas v. Cunningham*, 294 U.S. 207, 210 (1935); see also, *Broadcast Music, Inc. v. Star Amusements, Inc.*, 44 F.3d 485, 487 (7th Cir. 1995) (under current Act "the standard for reviewing an award of statutory damages within the allowed range is even more deferential than abuse of discretion"). Moreover, the award need not follow "as a matter of course from a finding of wrongdoing," *Albemarle Paper Co.*, 422 U.S. at 443 (Rehnquist, J. concurring), as it is not based on proof of actual damages.

remedy defeats any analogy to modern statutory damages. After the 1909 Copyright Act, and prior to the merger of law and equity, whatever "custom," if any, emerged is unclear.

Congress thus indicated its intent that statutory damages claims be tried by judges. *Id.*

The use of the word "court" in sections 504(c)(1) and 504(c)(2) in combination with this broad grant of discretion confirms that Congress intended a judge to hear the case. "The words 'court' and 'judge' or 'judges,' are frequently used in statutes as synonymous. When used with reference to orders made by the court or judges, they are to be so understood." *Black's Law Dictionary* 318 (5th Ed. 1979). The preeminent treatise, *Nimmer on Copyright*, describes this interpretation as the "better view." Melville B. Nimmer & David Nimmer, 4 *Nimmer on Copyright* §14.04[c] at 14-63 (1997). As Nimmer further notes, this reading should apply to both Sections 504(c)(1) (ordinary statutory damages) and 504(c)(2) (willful statutory damages), as they both use the word "court" and both grant broad discretion. *Id.*

Elsewhere in the Copyright Act, Congress used "court" to mean judge and did not use it where a jury was required. The actual damages provision, clearly a jury claim, does not use the term "court." 17 U.S.C. § 504(b). The attorneys fees and costs provision, clearly a judicial determination, does contain the term "court." 17 U.S.C. § 505.⁵

⁵ *Curtis v. Loether*, 415 U.S. 189 (1974), is often cited in this context for the proposition that "court" does not always mean judge. In that case, section 812 of the Civil Rights Act used "court" as a catch-all term, stating "The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than \$1000 punitive damages, together with court costs and reasonable attorneys fees" This provision, misdescribed

B. Statutory Damages Are An Equitable Remedy, and Thus Should Be Decided By a Judge

1. Discretion Is At The Heart Of Equity

"Equity eschews mechanical rules . . . [and] depends on flexibility." *Holmberg v. Armbricht*, 327 U.S. 392, 396 (1946). Discretion has been described as the essence of equity. Dan B. Dobbs, *Handbook on the Law of Remedies* § 2.1 at 28 (1973).

As discussed above, the discretion granted by this statute is very wide--so wide that appellate review occurs under a standard more deferential than abuse of discretion. *Douglas*, 294 U.S. at 210; *Star Amusements*, 44 F.3d at 487. Since statutory damages are not, and cannot be, firmly grounded in actual proof of damages, their very nature requires that the trial court have wide latitude in determining them.

The wide latitude given to the court to determine statutory damages is at odds with all that characterizes a legal

as "similar to the one at bar," *Educational Testing Services v. Katzman*, 670 F. Supp. 1237, 1239 (D.N.J. 1987), simply uses "court" as the subject in a provision listing both relief that clearly must be awarded by a judge and relief that clearly must be awarded by a jury. The *Curtis* Court did not address the meaning of the word "court," but rather determined that an actual damages award necessitates a jury trial. There is no dispute here that actual damages in copyright cases require a jury trial.

remedy. For example, the plaintiff in a copyright case is required to prove the fact of *legal* damages with reasonable certainty.⁶ "The distinguishing characteristics of legal remedies are their uniformity, their unchangeableness or fixedness, their lack of adaptation to circumstances, and the technical rules which govern their use." John N. Pomeroy, *A Treatise on Equity Jurisprudence* § 109 (4th ed. 1918). One cannot so describe statutory damages, as they are neither grounded in specific facts nor guided by legal rules that dictate an outcome based on the facts found.

The discretionary weighing and balancing of the parties' interests inherent in statutory damages is also typical of equitable remedies. See *Leo v. Sims*, 930 P.2d 153, 163 (New Mex. 1996) (partition is by nature an equitable remedy because it allows balancing of interests instead of application of "rigid formulae"). "[S]ince all or almost all equitable remedies are discretionary, the balancing of equities and hardships is appropriate in almost any case as a guide to the chancellor's discretion." Dobbs, *Remedies* at 52.

⁶ *Ganz v. Lyons Partnership*, 961 F.Supp. 981, 992 (N.D. Tex. 1997) (The fact of "damages must be proved by competent evidence with reasonable certainty . . . 'This means that, at a minimum, opinions or estimates of lost profits must be based on objective facts, figures, or data from which the amount of lost profits can be ascertained.'").

2. By Stepping in Where Legal Remedies Fail, Statutory Damages Fulfill A Classic Role of Equity

Statutory damages were "adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits." *Douglas*, 294 U.S. at 209. Equitable remedies have always been employed in just such circumstances--where legal remedies fail. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 514 (1947).

As one court examining this issue observed, "Congress has simply authorized by statute what equity courts have long done as a matter of course" *Broadcast Music, Inc. v. Papa John's, Inc.*, 201 U.S.P.Q. 302, 304-05 (N.D. Ind. 1978); see also Supplemental Copyright Act of 1819, 15th Cong. 2d Sess., 3 Stat. 481 (establishing jurisdiction of federal equity courts over copyright actions). "In codifying this remedy, Congress did not remove it from the equitable jurisdiction of the courts, instead, they simply provided guidelines to be used by the courts in the exercise of their discretion." *Id.*

3. Statutory Damages Are Restitutionary In Nature, And Thus Equitable

As this Court has noted, statutory copyright damages are restitutionary. They "compel[] restitution of profit and

reparation for injury." *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952).⁷

In this way, statutory damages are like Title VII backpay awards, which have also been determined to be restitutionary and thus equitable. See *Teamsters Local No. 391 v. Terry*, 494 U.S. 558, 572 (1990); *Curtis v. Loether*, 415 U.S. at 196-97 & n.13 (citing lower court cases holding that backpay awards are equitable). Damages are

⁷ The *Woolworth* Court went on to say that statutory damages are "also . . . designed to discourage wrongful conduct." *F.W. Woolworth*, 344 U.S. at 233. The Eighth Circuit has taken this statement to indicate that they are by nature a penalty. *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635, 643 (8th Cir. 1996). When viewed in the context of facts of the *F.W. Woolworth* case and other cases like it, however, this statement does not indicate that statutory damages are punitive. As discussed above, the unique nature of a copyrighted work makes it possible to take it without depriving the owner of its use, and without gaining profits or causing damages that are easily ascertained. See *F.W. Woolworth*, 344 U.S. at 233 (discussing difficulty of determining profits in that case). Given the ease of copying, it is necessary to ensure that it costs more to infringe than to obey the copyright laws, lest statutory damages fail to account fully for the harm done and infringement become an attractive gamble. See *Iowa State University Research Found. v. American Broadcasting Cos.*, 475 F. Supp. 78, 83 (S.D.N.Y. 1979) (setting damages higher than price of work). This court has held that statutory damages are not a penalty. *L.A. Westermann Co. v. Dispatch Printing Co.*, 249 U.S. 100, 107-08 (1919). That decision has not been overruled, nor should it be given the unique nature of copyrighted works.

characterized as equitable "where they are restitutionary, such as in 'action[s] for disgorgement of improper profits.'" *Terry*, 494 U.S. at 570 (quoting *Tull v. United States*, 481 U.S. 412, 424 (1987)).⁸

III. JUDGES ARE BETTER SUITED TO EXERCISE DISCRETION IN DETERMINING STATUTORY DAMAGES AND TO CARRY OUT COPYRIGHT POLICY

In *Markman v. Westview Instruments*, the Court examined three factors to decide whether judges or juries were better-suited to make the determination at issue:⁹ (1) Are a judge's training and experience especially suited to the determination? (2) Does the jury bring any special competencies to the task? and (3) Would placing the

⁸ The fact that restitutionary remedies are equitable refutes the simplistic argument offered by some that statutory damages are legal merely because they are monetary. "This Court has not . . . held that 'any award of monetary relief must necessarily be 'legal' relief.'" *Terry*, 494 U.S. at 570 (quoting *Curtis*, 415 U.S. at 196).

⁹ Before *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384 (1996), courts and commentators often dismissed the "relative abilities of judges and juries" prong of *Ross* in a perfunctory manner. Characterizing the inquiry as whether a matter was 'too hard' for a jury, they found analysis of this factor unproductive. See, e.g., *Video Views v. Studio 21*, 925 F.2d 1010, 1015 (7th Cir.), cert. denied, 502 U.S. 861 (1991); *Educational Testing Services*, 670 F. Supp. at 1243. This Court's *Markman* decision shows they were misguided in ignoring this factor.

determination in the hands of the judge or the jury better promote the policy underlying the statute?

In *Markman*, the Court first determined that interpreting patent claims required the construction of written instruments, "one of those things that judges often do and are likely to do better than jurors unburdened by training in exegesis." *Markman*, 116 S. Ct. at 1395 (1996). The Court then examined a jury's unique strengths "to evaluate demeanor, . . . to sense the 'mainsprings of human conduct,' [and] . . . to reflect community standards." *Markman*, 116 S. Ct. at 1395 (citations omitted). It determined that these strengths were "much less significant" to determining the meaning of patent claims than the special abilities of a judge. *Id.*

The Court cited the third factor -- promotion of the statutory policy -- as an "independent reason to allocate all issues of construction to the court." *Markman*, 116 S. Ct. at 1396. Nevertheless, the analysis once again weighed the relative abilities of the judge and jury--in this instance to promote the statutory policy, which was uniformity of the patent laws. *Id.* As either an independent factor or as part of an overall analysis of the relative abilities of judges and juries, this factor weighs in favor of holding that judges should determine statutory damages.

Analysis of these factors demonstrates that judges are most competent to decide this issue, that a jury's unique strengths are less significant in determining statutory damages, and that judges are more likely to carry out the congressional intent underlying statutory damages.

A. Judges' Experience And Training Better Suit Them To Determining Statutory Damages

Congress granted broad discretion to determine statutory damages, but, in the end, the court must have some basis for its decision. *Broadcast Music, Inc. v. Star Amusements, Inc.*, 44 F.3d 485, 487 (7th Cir. 1995) (court must state some basis for its determination). Courts have articulated many factors that affect the amount of statutory damages awarded.¹⁰ The opinions usually cite a number of factors influencing the decision, with no one of them being determinative and no mechanistic formula being applied to reach the determination. Courts normally weigh the various factors, employing some method of balancing to determine the amount of the award. See, e.g., *L&L White Metal Casting Corp. v. Cornell Metal Specialties Corp.*, 353 F. Supp. 1170, 1176 (E.D.N.Y. 1972), *aff'd*, 177 U.S.P.Q. 673 (2d Cir. 1973).

Judges are accustomed to using their discretion in weighing a number of elements to reach a just result. In the words of the *Markman* decision, it "is one of those things that judges often do" 116 S. Ct. at 1395.

¹⁰ These include: The expenses saved by the infringer, the profits made by infringer, the revenues lost by the plaintiff, the value of the copyright, the infringer's state of mind, compensating creativity, ensuring that it costs more to violate the copyright laws than it does to comply with them, the number of copies made, and the plaintiff's delay. See Goldstein, *Copyright* § 12.2.1 at 12:35-44 and cases cited therein.

In copyright cases, for example, to determine whether to award injunctive relief, judges must weigh and balance several factors.¹¹ Although the criteria are well-established, there is no mechanical formula for applying them. The judge determines which factors should weigh heaviest, and how they combine to dictate the remedy. This unrestricted weighing and balancing is typical of the functions that are assigned to judges.¹² It is also highly analogous to the decisionmaking process for a determination of statutory damages.

Judges' familiarity with weighing and balancing non-formulaic criteria extends even to awarding monetary relief such as statutory damages. As discussed above, statutory damages are analogous to the Title VII backpay remedy, which is an equitable, judicial remedy. This Court has said that remedy should not be applied "us[ing] stereotyped formula," but instead, with "the freedom given . . . by Congress to attain just results in diverse, complicated situations." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 198 (1941).¹³

¹¹ Although a jury will hear the rest of the case if, for example, actual damages are claimed, the judge must determine whether to award an injunction.

¹² Sidney Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions* 44 Duke L.J. 1051, 1061-62 (1995) ("much of judicial doctrine is indeterminate").

¹³ The Court was specifically addressing the backpay provisions of the National Labor Relations Act. Title VII backpay provisions were expressly modeled on that remedy. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 & n.11

This experience in discretionary weighing and balancing is only one of several resources on which judges can draw to aid in determining statutory damages. Unlike a jury, a judge can look to his or her own previous experience and that of colleagues in copyright and other commercial cases. A judge can study reported decisions in which colleagues have considered the amount of statutory damages to award. A judge can also study the purpose of the statute, as expressed in legislative history and case law.

A judge's training, experience, and resources thus make a judge particularly well-suited to determining statutory damages. The Act gives the court great discretion to do so, and the judge's background ensures that this discretion is exercised prudently.

B. Juries Bring No Special Competencies To Determining Statutory Damages

A jury, in contrast to a judge, is not well-prepared to determine statutory damages. A lay jury likely never has given serious consideration to the policies underlying copyright infringement, nor has it ever engaged in the type of weighing and balancing that judges are accustomed to doing.

A jury's lack of experience in such matters is not a disadvantage in most instances. Through jury instructions, they are given guidance as to what outcomes are dictated by the facts that they find. Moreover, juries are valued for the special competencies cited in *Markman*: Their ability to discern credibility, understand human behavior, and "to reflect community standards." 116 S. Ct. at 1395.

(1975).

The determination of statutory damages is so fully committed to discretion, however, that little, if any, guidance can be given to the jury through instruction in the law. One might attempt to list for a jury the various factors that judges have listed in their opinions, but juries have no experience in the art of applying multi-factored balancing tests. Jurors would be unsure as to what weight to give to the various factors or how to reconcile them.¹⁴

The task of determining statutory damages starkly contrasts with other tasks a jury performs. Typically, a jury examines evidence, weighs its credibility, and determines whether the necessary burden of proof is met. A statutory damages claim normally presents few opportunities to examine evidence or determine its credibility. Nor is the burden of proof conventional. Statutory damages are designed to free the fact-finder from precisely that which typically binds juries--a strict basis in proven fact. "A jury that cannot understand the evidence and the legal rules to be applied provides no reliable safeguard against erroneous decisions." *In re Japanese Electronic Products Antitrust Litigation*, 631 F.2d 1069, 1084 (3d Cir. 1980), *rev'd on other grounds*, 475 U.S. 574 (1986).

Finally, a determination of statutory damages does not draw on jurors' insight into human conduct or on their

¹⁴ "The jurors are taken from the body of the country... They are second-hand dealers in law, and must get it from the judge. They can supply nothing themselves; they are a mere conduit pipe through which the court supplies the law that goes into the general verdict." *Skidmore v. Baltimore & O.R. Co.*, 167 F.2d 54, 60, 64 (2d Cir.), *cert. denied*, 335 U.S. 816 (1948).

experience as members of the community. The award is much more likely to turn on esoteric considerations like the value of the copyright or the policy of rewarding the creators of intellectual property.

C. Judges Will Better Understand And Carry Out The Policies Underlying Statutory Damages

"In cases where the evidence provides few if any clues for approximating actual damages and profits, courts often turn to the underlying rationale for statutory damages--sustaining copyright incentives while deterring infringement." Goldstein, *Copyright* § 12.2.1. Of course, this rationale must be understood in light of the overall purpose of the copyright laws: To provide enough protection to reward and thus encourage the work of creators and innovators without providing so much protection that it stifles the work of others. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

This task is not simple. Goldstein, *Copyright* § 1.14.1 at 1:43-45 (discussing difficulty of achieving this balance); Ian Novos & Michael Waldman, *The Effects of Increased Copyright Protection*, 92 J. Pol. Econ. 236 (1984) (empirically demonstrating difficult tradeoffs). The complexity of it does not necessarily make it unsuitable for a jury--after all, juries decide cases in which the plaintiff claims actual damages. In those cases, however, the policies underlying the copyright laws are carried out through the specific duties and instructions given to the jury.

In a statutory damages case, the task of vindicating these policies is discretionary, requiring a balancing of interests. Jury instructions or the closing arguments of the

parties are unlikely to adequately illuminate this difficult balancing of interests. In contrast, a judge regularly balances interests and either will be familiar with the statutory policies or can achieve such familiarity for the case at hand. A judge is thus more likely to promote the values underlying the copyright laws through an exercise of discretion.

A judicial determination of statutory damages is also more likely to promote the values of predictability and uniformity.¹⁵ When judges decide statutory damages, they must provide reasons for their decision. *Video Views*, 925 F.2d at 1016. Although other courts are free to exercise their discretion, they can look to earlier decisions for guidance. Similarly, attorneys can look to the same opinions to provide counsel to their clients.

As this Court has noted in a different context, consistency is an important goal, even where Congress has granted discretion: "Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1973). "Uncertainty of this sort can cause a balancing test to send either too weak or too strong a signal." Jason S. Johnson, *Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form*, 76 Cornell L. Rev. 341, 357 (1991). It is thus important that the responsibility to exercise discretion to award statutory

¹⁵ Although uniformity and predictability are most often seen as essential to the patent system, see *Markman*, 116 S. Ct. at 1396, they are also essential to the copyright system. *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 162 (1989).

damages not be placed in the hands of juries, which lack the ability of judges to implement the underlying policies or the opportunity to explain their decisions for future use.¹⁶

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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¹⁶ Much is at stake. A large part of the value of the U.S. entertainment industry, for example, consists of copyrighted works. Moreover, copyrights are increasingly important to American technological innovation, as they are used to protect software and other technology. See, e.g., *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 49 F.3d 807 (1st Cir. 1995), *aff'd by an equally divided court*, 516 U.S. 233 (1996).